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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Advantage Marketing, Inc.

Serial No. 75/765,377

Bretton L. Crockett of TraskBritt, PC for Advantage
Marketing, Inc.

Stephanie M. Davis, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Walters and Bucher, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Advantage Marketing, Inc. has filed an application to
register NUTRACEUTICA as a trademark for "nutritional
supplements."¹ The Trademark Examining Attorney has refused
registration under Section 2(d) of the Trademark Act in
view of the prior registration of NUTRICEUTICA for

¹ Serial No. 75/765,377, filed August 26, 1999, based on
applicant's allegation that it has a bona fide intention to use
the mark in commerce.

"computer software for use in maintaining a database of nutritional and natural medicine."²

When the Examining Attorney made the refusal final, applicant appealed. Both applicant and the Examining Attorney filed briefs, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The marks NUTRACEUTICA and NUTRICEUTICA are virtually identical in appearance but for a single letter. The marks would be pronounced in much the same way and create the same commercial impression.

Essentially conceding the identity of the marks, applicant has focused on the differences in the goods and

² Registration No. 2,427,403 issued February 6, 2001.

the asserted differences in their channels of trade and classes of customers.

The Examining Attorney argues that the involved goods are related because offering nutritional supplements is within registrant's normal field of expansion. In support of this contention, the Examining Attorney submitted a copy of the Internet home page of a third party, which shows that this company offers nutritional supplements and provides information about the supplements at its website. The Examining Attorney also submitted a copy of registrant's Internet home page, which shows that registrant's computer software contains information about, inter alia, nutritional supplements.

Applicant, in urging reversal of the refusal to register, contends that registrant's Internet home page shows that registrant's computer software is of a type that would be marketed to and purchased by pharmacists in maintaining a computer database. Further, applicant argues that its nutritional supplements are sold through retail stores and are marketed to consumers to supplement their diet. Applicant also disputes the Examining Attorney's contention that a computer software provider would normally expand into the field of nutritional supplements.

It is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or are asserted to actually be. *Octocom Systems, Inc. v. Houston Computer Services Inc.*, 918 USPQ F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In the absence of any limitations in applicant's application and the cited registration, we must presume that applicant's and registrant's goods move in all channels of trade normal for such goods to all the usual purchasers. Thus, for purposes of our analysis, we must assume that registrant's computer software would be purchased by all the usual purchasers of computer software, including ordinary consumers.

Nonetheless, in this case, we are not persuaded that the respective goods are sufficiently related that confusion is likely. There is no evidence of record which suggests that nutritional supplements, on the one hand, and computer software for use in maintaining a database for nutritional and natural medicine, on the other hand, are the kinds of goods that generally emanate from a single source under the same mark. Also, the Examining Attorney's

evidence is not probative of whether companies that offer nutritional supplements would normally expand their businesses to include computer software for use in maintaining a database of nutritional and natural medicine. The evidence made of record by the Examining Attorney shows only that a third-party company offers nutritional supplements and provides information about such supplements at its website. Apart from the fact that the evidence relates to only a single company, there is nothing at the web site which indicates that this company offers computer software for use in maintaining a database of nutritional and natural medicine.

Further, there are specific differences between applicant's nutritional supplements and registrant's computer software for use in maintaining a database for nutritional and natural medicine. In particular, nutritional supplements are products that are generally taken to improve overall health, whereas computer software for use in maintaining a database for nutritional and natural medicine is in the nature of written or printed data, such as a program, with information about nutritional and natural medicine.

In sum, notwithstanding the substantial similarity of the marks, we find that there is no likelihood of confusion because of the differences in the respective goods.

Decision: The refusal to register under Section 2(d) is reversed.